

**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN 11, TEXAS

**WAGGONER CARR
ATTORNEY GENERAL**

August 13, 1965

Honorable Jack N. Fant
County Attorney
El Paso County Courthouse
El Paso, Texas

Opinion No. C-482

Re: Whether the Commissioners Court of El Paso County has the authority to grant an easement for construction of a natural gas underground pipeline across Ascarate Park, a county-established park, under the facts stated.

Dear Mr. Fant:

You have requested the opinion of this office as to whether the Commissioners Court of El Paso County has the authority to grant an easement for construction of a natural gas underground pipeline across Ascarate Park. You advise us that on October 11, 1937, Cordell Hull, as Secretary of State of the United States, conveyed a certain tract of land to the County of El Paso for public recreational purposes. In examining this conveyance we note that the term "public recreational purposes" is repeated several times, and that there is contained therein a reversionary clause, by virtue of which the land is to revert to the United States in the event "that the County of El Paso shall cease to utilize the said described premises wholly for public recreational park purposes. . ." (emphasis supplied). The land conveyed by this deed has been and is now known as Ascarate Park, and has been and is now operated and maintained by the County of El Paso as a public park. A natural gas company has applied for an easement to install an underground gas pipeline across a part of Ascarate Park, and you seek our advice as to the propriety of the granting of this easement, in view of the reversionary clause contained in the conveyance from the United States Government.

We have been favored by several able briefs by the various parties involved in this question. In one of these briefs, it was contended that Article 2351, Vernon's Civil Statutes, provides the authority whereby the County of El Paso may properly grant

this easement, for the reason that Section 19(e) thereof authorizes the county to sell, lease or exchange land received from the Federal Government. This contention must fall, for the reason that Section 19(b) thereof authorizes the county to bind itself to comply with any and all terms and conditions imposed by the Federal Government as a prerequisite to the transfer of the land. The County of El Paso, in this case, bound itself to preserve the land wholly as a public recreational area. It would appear that the contract, standing alone, would operate to forbid the county to make any use of the land inconsistent with a wholly public recreational use.

If further authority were needed, we have only to look to the case of Zachry vs. City of San Antonio, 157 Tex. 551, 305 S.W.2d 558 (1957). In an exhaustive opinion, Justice Griffin reviewed the law surrounding the uses which may be made of land which has been dedicated as a public park, as has Ascarate Park. In this particular area of the law, it does not appear to matter whether the governmental agency involved is a city or a county; the same limits are imposed upon both types of governmental unit. In Zachry, which dealt with a lease to build an underground parking garage beneath Travis Park in San Antonio, it was held that the City had no power to lease where there had been a dedication to public park usage. Admittedly, in the Zachry lease there would have been a loss to the public of approximately one-fourth of the park area; the decision of the Court was not based upon the loss factor, but upon the City's lease in violation of the dedication to the public. Justice Garwood's concurring opinion stated that he would have reached a different result from the majority had the lease involved only the sub-surface, and resulted in no loss of land to the public use.

In the particular case before us, it is apparently not contemplated that there would be any diminution of the land area available to the public. Nevertheless, it is the opinion of this office that the easement in question would not be consistent with the wholly public recreational use insisted upon by the contract to which El Paso County bound itself, and to which Ascarate Park has been dedicated.

SUMMARY

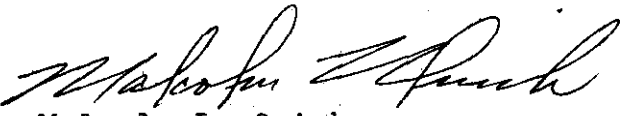
Ascarate Park is dedicated to wholly public use both by contract between El Paso County and the Federal Government, and by the actions of the Commissioners Court of El Paso County. The Commissioners Court has no power to grant an easement across the

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Park to a private corporation for the installation of an underground natural gas pipeline, for such an easement would not be consistent with a wholly public recreational use of the Park.

Yours very truly,

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Attorney General

By 
Malcolm L. Quick
Assistant

MLQ:ms

APPROVED:

OPINION COMMITTEE

W. O. Shultz, Chairman
Linward Shivers
Milton Richardson
Ralph Rash
C. L. Snow

APPROVED FOR THE ATTORNEY GENERAL
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